Supreme Court
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No. 96-1024

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

Ohio Association of Independent Schools, et al.,
Petitioner,

v.

John Goff, et al.,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Betty D. Montgomery
Attorney General

Jeffrey S. Sutton
State Solicitor
Counsel of Record
Christopher M. Culley
John P. Ware
Sharon A. Jennings
Charles W. See
Assistant Attorneys General
30 East Broad St., 17th Flr.
Columbus, Ohio 43215-3428
(614) 466-8980

COUNSEL FOR RESPONDENTS

QUESTION PRESENTED FOR REVIEW

Do private schools have a constitutional right not to administer state high schooi proficiency tests?

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STATEMENT OF THE CASE

A. Introduction

This case involves an association (the Ohio Association of Independent Schools) and its members (the "OAIS schools") (collectively, "petitioners") who object to amended Ohio Rev. Code ("O.R.C.") § 3301.16, which requires chartered, non-public Ohio schools to administer the Ohio Ninth Grade Proficiency Test. After failing to convince the Ohio legislature to exempt the OAIS schools from the testing requirement, petitioners filed this action claiming that the test violates their First and Fourteenth Amendment rights. Both the district court and Sixth Circuit properly rejected these claims and accordingly each entered judgment against petitioners.

B. The Ninth Grade Proficiency Test

In 1987, the Ohio General Assembly passed legislation requiring public high schools to administer a ninth grade proficiency test, a state-wide exam designed to measure proficiency in four subject areas: reading, writing, mathematics and citizenship. *See* O.R.C. §§ 3301.16 and 3301.0710. The legislation required students to receive a passing score in all four subject areas of the test in order to graduate from a public high school. *See* O.R.C. § 3313.612.

On July 1, 1993, the Ohio General Assembly extended the proficiency test to chartered, non-public schools and their students. In doing so, the Ohio General Assembly followed a recommendation by the Ohio State Board of Education, which thought that private school students should take the test for two reasons: (1) all students, whether attending chartered private or public schools, could benefit from the test, and students should not be able to avoid the

requirement by transferring to a private school, and (2) the proficiency test results from those private schools that had voluntarily elected to administer the test showed room for improvement.

In October 1995, as a result of this amendment all chartered non-public schools were scheduled to administer the test for the first time. Shortly before the first testing date, petitioners filed this lawsuit alleging that the test was unconstitutional because it requires private schools to modify their curricula. After a five day trial, the district court found that the test does not intrude on private schools' ability to dictate their own curricula and found that R.C. § 3301.16 is constitutional since: (1) the legislation requires only that the schools administer the test and any extra time spent preparing for the test is the result of independent and voluntary choices made by the private schools; (2) Ohio Minimum Standards already require private schools to teach the subject areas covered on the exam; and (3) the test sets a floor of skills and knowledge that students must learn, not a ceiling. *See* Petition at A-30, A-31. The court of appeals (Merritt, Keith, *Suhrheinrich*) affirmed, holding that it is reasonable for the state to use the test to ensure that students from both public and private schools meet certain basic standards. *See* Petition at A-8. Both courts agreed that rational basis review governs this challenge. *See* Petition at A-7, A-25.

REASONS FOR DENYING THE WRIT

I. No Lower Court Split Exists On The Questions Presented.

Petitioners raise two related questions: do private schools have a constitutional right not to administer state proficiency exams? And what is the standard for assessing such claims? Neither question, as an initial matter, warrants

the Court's attention because petitioners have not established any lower-court conflict. Indeed, they have not even tried to do so.

The reason is straightforward. The Sixth Circuit is in good company on both counts. Whether looking at these matters as substantive due process or inchoate free speech claims, the lower courts have uniformly rejected them.

For example, in *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996), *petition for cert. filed*, (Nov. 26, 1996) (No. 96-848), the Fourth Circuit recently considered a challenge brought by parents to a state regulation requiring students to perform 50 hours of community service prior to graduation. Aptly recognizing that the only objection to the program was a secular one (as here), the court held that heightened review of the issue was not required. *Id.* at 178-179. Other courts have done likewise. *See Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2nd Cir. 1996), *cert. denied*, 117 S.Ct. 60 (1996) (parents' right to direct their children's secular education is subject only to rational basis review); *Vandiver v. Hardin County*, 925 F.2d 927 (6th Cir. 1991) (the Constitution does not protect those who would avoid administering or taking a test); *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988) (no fundamental right to supervise children's education to extent parents seek responsibility over every aspect of that education). Under these circumstances, the Court should not devote its limited time to this case or these issues.

II. The Sixth Circuit Correctly Held That The Constitution Does Not Prohibit Proficiency Testing Of Private School Students.

Nor have petitioners shown that this case raises substantial federal questions. Adhering to well-established

precedent from this Court, the lower courts correctly rejected petitioners' Fourteenth and First Amendment claims.

A. The Fourteenth Amendment Does Not Prohibit Proficiency Testing.

Petitioners principally argue that the proficiency test violates their Fourteenth Amendment substantive due process rights and privacy rights because it purportedly dictates the curriculum each private school must teach. This claim is mistaken as a matter of fact and as a matter of law. As a matter of fact, petitioners have simply not established that the proficiency test compels any curriculum modification at all. Indeed, the district court specifically concluded that there was no evidence that any curriculum modification would be necessary or required. *See* Petition at A-29, A-30.

As a legal matter, even granting the premise that proficiency tests compel curriculum changes, petitioners are wrong as well. Neither *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), nor *Meyer v. Nebraska*, 62 U.S. 390 (1923) are to the contrary. While *Pierce* and *Meyer* recognize that parents have a Fourteenth Amendment liberty interest in the education of their children, they also recognize that the right is not unlimited. Yes, parents may have a constitutional right to send their children to private schools, but that does not mean that the State is unable to regulate those schools. As the Court later pointed out in *Board of Education v. Allen*:

> Since *Pierce* a substantial body of case law has confirmed the power of the states to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions that provide minimum hours of instruction, employ teachers of specified

> training, and cover prescribed subjects of instruction. . . . These cases are a sensible corollary to *Pierce v. Society of Sisters*: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.

392 U.S. 236, 246-247 (1968). To the same effect is *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) which makes clear that, "while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."

No less defective is petitioners' assertion that the test infringes their "fundamental right of privacy." Once again *Pierce* and *Meyer* simply do not go this far.

> A person's decision whether to bear a child and a parent's decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities. But it does not follow that because the government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education. * * * Indeed, the Court in *Pierce* expressly acknowledged "the power of the State reasonably to regulate all schools, to inspect, supervise and examine

them, their teachers and pupils."

Runyon, 427 U.S. at 178. *See also Allen*, 392 U.S. at 246-247 (states have a proper interest in the manner in which private schools perform their secular function); *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (right of privacy does not protect parental decisions concerning direction of a child's education).

Under Ohio law, moreover, a *Pierce/Meyer* claim is even more unsound. Ohio permits parents to avoid all but minimal state regulation over their children's education by allowing them to send children to non-chartered private schools or by allowing them to home-school them. *See* O.R.C. § 3321.04 and Ohio Admin. Code § 3301-35-078. Proficiency tests are not required in either setting.

B. The First Amendment Does Not Prohibit Proficiency Testing.

Nor is there any First Amendment doctrine that permits private schools to avoid administering proficiency tests. The only First Amendment claim raised below was that the test somehow constrained speech. The lower courts properly rejected this claim for several reasons, foremost among them the absence of any evidence that petitioners' speech had in fact been curbed.

Petitioners now raise several other First Amendment arguments for the first time. These claims obviously have been waived. At all events, the claims are flawed. Contrary to petitioners' suggestion, Petition at 8-9, the proficiency test does not prevent petitioners from teaching any particular subject, require them to teach in any particular way or force them to teach any particular ideological viewpoint.

Of course, petitioners are right that a state cannot require an individual to disseminate an ideological message. *See Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1 (1986) (State cannot require private corporation to disseminate political messages of other groups); *Wolley v. Maynard,* 430 U.S. 706 (1977) (State cannot require individual to disseminate ideological message on license plate); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (State cannot require students to participate in pledge of allegiance). But that rule, and the cases supporting it, do not begin to establish that States lack the authority to administer a test measuring basic educational competency.

Petitioners also suggest that the test violates the First Amendment because the State requires students to give the "right" answer to the test questions. *See* Petition at 8. This may be true. But it is a problem that cannot be avoided under any of the customary methods of testing proficiency, including those in place when the First and Fourteenth Amendments were ratified. While petitioners suggest that these "right" answers may be subject to a particular bias or interpretation, petitioners are unable to point to any particular question or subject area that they find objectionable.

Petitioners next suggest that the test imposes "speech" on private schools, relying on *United States v. O'Brien*, 391 U.S. 367 (1968) and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). While both cases recognize that a State cannot prohibit certain conduct that amounts to speech due to its political nature, neither one stands for the distinct proposition that a State imposes speech restrictions by requiring a school to administer a proficiency test.

Petitioners finally try to bolster their claim by noting

that the test allows the State criminally to sanction parents whose children do not attend a chartered public or private school. Even if true, petitioners offer no explanation why this would violate the First Amendment. In any event, they are wrong. As noted, parents may send their children to private non-chartered schools and in some cases home-school their children without violating Ohio's compulsory education laws. *See* O.R.C. § 3321.04 and Ohio Admin. Code § 3301-35-078.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the Court should deny the writ.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

JEFFREY S. SUTTON
State Solicitor
Counsel of Record
CHRISTOPHER M. CULLEY
JOHN P. WARE
SHARON A. JENNINGS
CHARLES W. SEE
Assistant Attorneys General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 466-8980

COUNSEL FOR RESPONDENTS